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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MICHAEL SCHIFFMAN, Plaintiff and Appellant, v. JEFFREY KNOLL, Defendant and Respondent.	B286311 (Los Angeles County Super. Ct. No. BC665768)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara A. Meiers, Judge. Affirmed.

Herzog, Yuhas, Ehrlich & Ardell, Ian Herzog and Susan E. Abitanta for Plaintiff and Appellant.

Law Offices of Jeffrey Knoll and Jeffrey Knoll for Defendant and Respondent.

INTRODUCTION

Jeffrey Knoll, an attorney, hired Michael Schiffman, an orthopedic surgeon, to testify as an expert in a civil case in San Diego Superior Court and paid him a $7,000 fee in advance. Schiffman, however, did not appear at the trial and refused to return the money. Knoll sued Schiffman in small claims court to recover the $7,000.

During the pendency of the small claims action, counsel for Schiffman threatened that, if Knoll did not dismiss his small claims complaint, Schiffman would sue Knoll for malicious prosecution. In response, Knoll threatened that, if Schiffman did not refund the $7,000, Knoll would notify every member of the Consumer Attorneys Association of Los Angeles (CAALA) that Schiffman had failed to appear at trial and refused to refund the money.

After Knoll prevailed in his small claims action, Schiffman filed this action for extortion. The trial court sustained Knoll's demurrer without leave to amend and dismissed the action. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Knoll Sues Schiffman and Threatens To Make Public Statements About Him to a Large Group of Attorneys*

Knoll retained Schiffman to testify as an expert. Due to a scheduling miscommunication, for which each side blamed the other, Schiffman did not appear at the trial. When Schiffman refused to refund the $7,000 advance fee, Knoll filed a small claims action against Schiffman. Knoll alleged Schiffman "was

hired for trial testimony and was paid in advance. However, [Schiffman] did not testify at trial, and funds must be returned."

Counsel for Schiffman sent Knoll a letter demanding Knoll dismiss his small claims action. Counsel for Schiffman wrote: "A physician with a busy practice, such as Dr. Michael Schiffman, who clears his schedule to appear in court, is entitled to compensation. The modest expert witness fee involved . . . does not fully cover the financial losses of a busy doctor who takes time away from his practice in order to do his duty to serve as a trial witness." Counsel also stated Knoll should have filed his small claims action against Schiffman's medical practice, not Schiffman. Counsel for Schiffman claimed that Knoll acted maliciously by not stipulating to have a temporary judge hear the small claims action when Schiffman appeared in court and that Knoll could avoid a malicious prosecution lawsuit if he dismissed the matter within seven days.

Knoll wrote a responsive letter stating that Schiffman did not even appear at the initial date for the small claims trial (which resulted in a continuance) and that a temporary judge could not hear the matter because "the court rules do not permit an attorney/party case to be heard by a Judge Pro Tem." Knoll also asserted that Schiffman, not his medical practice, was responsible for the $7,000 because Knoll paid the advance fee to Schiffman. Knoll wrote: "It is unfortunate that after working with Dr. Schiffman's office for over twenty years, and having sent checks over the years totaling literally hundreds of thousands of dollars, your client would take the arrogant position of keeping expert witness fees that were advanced as a courtesy to him when due to an apparent calendaring error in his office he failed to appear at trial." Finally, Knoll stated that, if Schiffman did

not return the $7,000 within four days, Knoll would be "notifying every member of Consumer Attorneys [Association] of Los Angeles (CAALA), of Dr. Schiffman's failure to appear at trial for expert testimony, and then refusing to refund the advanced fees by way of the CAALA Law Discussion List."[1]

Two days later, counsel for Schiffman wrote to Knoll and accused him of extortion, stating that the penalty for extortion was "two, three or four years" under Penal Code sections 520 and 1170.[2] Counsel for Schiffman stated: "Even if you had a righteous claim for the nonrefundable fee in this case—which Dr. Schiffman adamantly denies, your extortion remains extortion." Counsel for Schiffman closed his letter by threatening: "You keep this up, you will get sued for either malicious prosecution, defamation or extortion."

B. *Schiffman Sues Knoll for Extortion, and the Trial Court Dismisses His Complaint*

True to his attorney's word, Schiffman filed this action against Knoll for extortion. Using a form complaint approved by the Judicial Council, Schiffman checked the boxes for

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[1] Knoll was referring to CAALA's "List Serve," which allows "CAALA Attorney Members to confidentially exchange important work-product information and advice with each other, relating to: trial strategy, references and background of experts, judges, defense attorneys, defendants, arbitrators, and mediators; case evaluation information; recent developments in the law; court rules; pleadings; tactics; attorney referrals, legal research, legal questions and other attorney work-product information." (<https://www.caala.org/index.cfm?pg=joinlists> [as of Feb. 27, 2019].)

[2] Undesignated statutory references are to the Penal Code.

"Intentional Tort" and "Other" and alleged his cause of action was a "[c]laim for extortion per the attached letter from Jeffrey Knoll to Michael Schiffman which makes this conduct actionable." Schiffman attached to his complaint the letters exchanged between his attorney and Knoll.

Knoll demurred. Characterizing the letters as "settlement negotiations," Knoll argued Schiffman had not stated a cause of action for extortion because Knoll had a legal right to inform CAALA members of Schiffman's conduct. Knoll also argued his letter was "squarely within" the litigation privilege. In opposition to the demurrer, Schiffman argued that the letter was extortion and that the litigation privilege did not apply to extortion.

The trial court sustained the demurrer without leave to amend.[3] The court stated that Knoll's letter "was not a threat to 'unlawfully injure' anyone and that it did not threaten to connect the doctor with a crime or disgraceful matter." The trial court also found that informing CAALA members of Schiffman's conduct was analogous to contacting the media and that "threatening to do something that a person has a legal right to do is not a threat to commit an unlawful injury." The court stated that the dispute was a commercial one on which Knoll was free to comment and that the litigation privilege protected Knoll's statement because the letter was "incident to litigation." The court entered a judgment of dismissal, and Schiffman timely appealed.

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[3] The trial court did not rule on Knoll's request for judicial notice of the May 22, 2017 small claims judgment in favor of Knoll. We granted Knoll's request for judicial notice of that judgment, as well as the November 29, 2017 judgment in the subsequent small claims appeal, which was also in favor of Knoll.

DISCUSSION

A. *Standard of Review*

"'In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory.' [Citation.] If the demurrer was sustained without leave to amend, we consider whether there is a 'reasonable possibility' that the defect in the complaint could be cured by amendment. [Citation.] The burden is on plaintiffs to prove that amendment could cure the defect." (*King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1050.) """[W]e accept the truth of material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice."'" (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 346.) "We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory." (*The Inland Oversight Committee v. City of San Bernardino* (2018) 27 Cal.App.5th 771, 779.)

B. *Civil Extortion*

"Extortion is the obtaining of property . . . from another, with his or her consent . . . induced by a wrongful use of force or fear . . . ." (§ 518, subd. (a).) Extortion is a crime, but it can also "form the basis of a civil action in tort." (*Fuhrman v. California Satellite Systems* (1986) 179 Cal.App.3d 408, 426, disapproved on another ground in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 219; see *Flatley v. Mauro* (2006) 39 Cal.4th 299, 326 (*Flatley*).)

Section 519 provides: "Fear, such as will constitute extortion, may be induced by a threat of any of the following:

"1. To do an unlawful injury to the person or property of the individual threatened or of a third person.

"2. To accuse the individual threatened, or a relative of his or her, or a member of his or her family, of a crime.

"3. To expose, or to impute to him, her, or them a deformity, disgrace, or crime.

"4. To expose a secret affecting him, her, or them.

"5. To report his, her, or their immigration status or suspected immigration status."

"Extortion has been characterized as a paradoxical crime in that it criminalizes the making of threats that, in and of themselves, may not be illegal. '[I]n many blackmail cases the threat is to do something in itself perfectly legal, but that threat nevertheless becomes illegal when coupled with a demand for money.'" (*Flatley*, *supra*, 39 Cal.4th at p. 326.) A person can commit extortion even if he or she does not obtain any money or property as a result of the threat (§ 523, subd. (a); *People v. Fisher* (2013) 216 Cal.App.4th 212, 216-217; *Monex Deposit Co. v. Gilliam* (C.D.Cal. 2009) 666 F.Supp.2d 1135, 1137) and even if he or she does not make "an express threat or a demand for a specific sum of money" (*Stenehjem v. Sareen* (2014) 226 Cal.App.4th 1405, 1424). Debt collectors and attorneys are not exempt from liability for extortion. (*Flatley*, *supra*, 39 Cal.4th at pp. 326-327.)

C. *The Litigation Privilege Bars Schiffman's Cause of Action for Extortion*

Was Knoll's letter extortionate? Probably not. Contrary to Schiffman's suggestion, it did not accuse Schiffman of theft or other crime within the meaning of section 519, subdivision (2). A dispute over payment for professional services allegedly not performed may be a breach of contract, but it is not theft. (See *Multani v. Knight* (2018) 23 Cal.App.5th 837, 853-854 [breach of contract, even if it results in injury or loss of specific property, is not conversion].) Nor did Knoll's letter expose Schiffman to "disgrace" within the meaning of section 529, subdivision (3). (See *Flatley*, *supra*, 39 Cal.4th at 332, fn. 16 ["our opinion should not be read to imply that rude, aggressive, or even belligerent prelitigation negotiations, whether verbal or written, that may include threats to file a lawsuit, report criminal behavior to authorities or publicize allegations of wrongdoing, necessarily constitute extortion"].) Knoll's letter certainly was not very professional. Indeed, had Knoll threatened to notify law enforcement or the California State Bar, he would have violated the California Rules of Professional Conduct. (See *Flatley*, at p. 327 ["the Rules of Professional Conduct specifically prohibit attorneys from 'threaten[ing] to present criminal, administration, or disciplinary charges to obtain an advantage in a civil dispute'"]; *Mendoza v. Hamzeh* (2013) 215 Cal.App.4th 799, 805 [same]; Cal. Rules of Prof. Conduct, former rule 5-100(A).) And Knoll's letter may have made it more difficult for him to retain experts in the orthopedic surgeon community in the future. But it probably did not, on the facts alleged, amount to extortion.[4]

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[4] That Knoll prevailed in his small claims action does not mean he did not commit extortion. "'[I]t is immaterial that the

But even if it did, the litigation privilege under Civil Code section 47, subdivision (b), protects Knoll from civil liability. "The litigation privilege applies 'to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.' [Citation.] '"The privilege 'is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards.' [Citation.]" [Citation.] The litigation privilege is interpreted broadly in order to further its principal purpose of affording litigants and witnesses the utmost freedom of access to the courts without fear of harassment in derivative tort actions. . . . The privilege is absolute and applies regardless of malice.'" (*Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1300.) As long as a communication has some reasonable relation to a judicial proceeding, the communication is immune from all civil liability other than malicious prosecution. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057; *Herterich v. Peltner* (2018) 20 Cal.App.5th 1132, 1138; see *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251 ["a prelitigation communication is privileged only when it relates to litigation that is contemplated in good

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money which [the defendant] sought to obtain through threats may have been justly due him.'" (*Flatley*, *supra*, 39 Cal.4th at p. 327.) "'It is the means employed [to obtain the property of another] which the law denounces, and though the purpose may be to collect a just indebtedness arising from and created by the criminal act for which the threat is to prosecute the wrongdoer, it is nevertheless within the statutory inhibition. The law does not contemplate the use of criminal process as a means of collecting a debt.'" (*Id.* at p. 326.)

faith and under serious consideration"]; *Kenne v. Stennis* (2014) 230 Cal.App.4th 953, 965 ["[b]ecause Civil Code section 47, subdivision (b) protects any statements or writings that have 'some relation' to a lawsuit, communications made both during and in anticipation of litigation are covered by the statute"].)

Moreover, "'communications made in connection with litigation do not necessarily fall outside the privilege merely because they are, or are alleged to be, fraudulent, perjurious, unethical, or even illegal' assuming they are logically related to litigation." (*Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 921; accord, *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 920; see *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 956 ["the privilege extends even to civil actions based on perjury"]; *Kenne v. Stennis*, *supra*, 230 Cal.App.4th at p. 965 ["'[t]he litigation privilege has been applied in "numerous cases" involving "fraudulent communications or perjured testimony"'"].)

Knoll's letter logically and directly related to pending litigation: the small claims action. Knoll sent his letter after he had filed his complaint in small claims court and in response to Schiffman's letter demanding that Knoll dismiss the complaint or face a malicious prosecution action. (See *Silberg v. Anderson*, *supra*, 50 Cal.3d at p. 212 [litigation privilege applies "to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved"]; *Malin v. Singer*, *supra*, 217 Cal.App.4th at pp. 1300, 1302 [litigation privilege barred cause of action for extortion because the demand letter "was logically connected to litigation that was contemplated in good faith and under serious consideration when the letter was

sent"].) Thus, the litigation privilege bars Schiffman's extortion action against Knoll.

Schiffman's reliance on *Flatley* for a contrary result is misplaced. In *Flatley*, the Supreme Court held that the litigation privilege in Civil Code section 47, subdivision (b), and the procedural provisions of Code of Civil Procedure section 425.16 "are not substantively the same" and that "some forms of illegal litigation-related activity may be privileged under the litigation privilege" but not subject to Code of Civil Procedure section 425.16. (*Flatley*, *supra*, 39 Cal.4th at pp. 323, 325; see *Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 581-582 ["[t]he statutory privilege for communications in judicial proceedings is not automatically converted to a constitutionally based protection such as that provided in [Code of Civil Procedure] section 425.16"]; *Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal.App.4th 324, 342 [Civil Code section 47 and Code of Civil Procedure section 425.16 "are not co-extensive"]; *Century 21 Chamberlain & Associates v. Haberman* (2009) 173 Cal.App.4th 1, 10 ["statements protected by the litigation privilege are not necessarily protected by [Code of Civil Procedure section 425.16]"].) As the Supreme Court explained in *Flatley*: "The litigation privilege embodied in Civil Code section 47, subdivision (b) serves broad goals of guaranteeing access to the judicial process, promoting the zealous representation by counsel of their clients, and reinforcing the traditional function of the trial as the engine for the determination of truth. Applying the litigation privilege to some forms of unlawful litigation-related activity may advance those broad goals notwithstanding the 'occasional unfair result' in an individual case." (*Flatley*, *supra*, 39 Cal.4th at

p. 324.) *Flatley* did not create an exception to the litigation privilege for allegedly extortionate statements.

Finally, Schiffman does not argue the trial court abused its discretion in denying him leave to amend. Nor does Schiffman suggest how he could amend his complaint to avoid the litigation privilege or otherwise state a cause of action against Knoll. (See *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320 ["[t]he plaintiff has the burden of proving that an amendment would cure the defect"]; *The Inland Oversight Committee v. City of San Bernardino, supra*, 27 Cal.App.5th at p. 779 ["[i]f the plaintiff does not demonstrate on appeal 'how he can amend his complaint, and how that amendment will change the legal effect of his pleading,' we must presume the plaintiff has stated his allegations 'as strongly and as favorably as all the facts known to him would permit'"].)

DISPOSITION

The judgment is affirmed. Knoll's motion for sanctions is denied. Knoll is to recover his costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J. FEUER, J.